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APPENDIX

Supreme Court

NEW YORK COUNTY

SPECIAL AND TRIAL TERM—PART 23

FELIX YOUSSOUPOFF,
Plaintiff,
—*against*—
COLUMBIA BROADCASTING SYSTEM, INC.,
Defendant.

Index No. 6416-63

November 8, 1965.

Before:

HONORABLE WILFRED A. WALTEMADE,
Justice, and a Jury.

Appearances:

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of Counsel

Alfred H. Ehrlich, CSR,
Official Court Reporter.

Appendix

The Court's Charge

Waltemade, J.: Madam Foreman, ladies and gentlemen, you have heard the evidence and the arguments of counsel, and it is now the duty of the Court to instruct you on the law which applies to this case.

The Court and the jury have separate functions. The jury is the sole judge of and decides the disputed facts, and the Court provides instructions on the law. It is your sworn duty to accept the instructions of the Court and to apply the law as it is given to you. You are not permitted to change the law nor to apply your own conception of what you think the law should be.

At the inception I charge you that your verdict must be based solely upon the evidence as you have heard it from the mouths of all the witnesses who have testified, from the various exhibits which were admitted in evidence, and such inferences as may be fairly and reasonably drawn from the oral testimony and exhibits. The objections, summations, and arguments of counsel are not evidence and must not be considered by you as such. These are merely arguments propounded by the respective lawyers to assist you in arriving at a conclusion, telling you what they believe to be the conclusions which you should draw from the evidence.

What I will say to you with regard to the facts is not evidence. Your recollection of the testimony prevails.

I caution you that a question is not evidence. The answers to questions are evidence.

I further caution you that any paper, book, or document which was not admitted into evidence is not to be considered by you, and you are not to conjecture or guess what that paper or document or book might have contained.

Appendix

I must remind you that it is your duty to determine from the evidence where lies the truth in this case; that is, which version of the evidence convinces you that it is credible or believable evidence. You may not surmise, you may not conjecture, you may not speculate, and you must predicate your verdict upon the evidence.

I also charge you that you are not to allow sympathy or prejudice to enter into your considerations. This case is of great importance to the plaintiff and to the defendant.

During the trial of this case certain questions were asked of the witnesses to which objections were made, and I overruled or sustained these objections. The rulings were made purely and solely upon questions of law. My rulings do not indicate any opinion of the facts by the Court. You must disregard the testimony also which was stricken from the record.

I referred to credible or believable evidence and I said you are the sole judges of what testimony you will believe. In determining the truthfulness of witnesses, use your own ordinary intelligence as practical persons who are accustomed to meeting and dealing with people in your everyday business and social life. You have observed these various witnesses upon the stand and you have heard them testify. Bring your everyday experiences into use in weighing the testimony of the witnesses and determine whether you believe them or not and to what extent you do believe them.

Differences in the testimony of witnesses describing the same event do not necessarily mean that any one of them is willfully telling an untruth. In evaluating all of the testimony you should understand that some people are keener than others, they observe more quickly and

easily and express themselves more readily and accurately. Compare the various witnesses and their testimony on direct and cross-examination and determine for yourselves what are the true facts.

If a witness has given testimony at this trial which you find is inconsistent with testimony the witness may have given at an examination before trial or in interrogatories, or the testimony given here is inconsistent with statements on the same matter made by the witness on any previous occasion, you may consider that fact as bearing upon the truthfulness of the witness and the value and worth of that witness' testimony given at this trial. You must take into consideration the character of the witness, the witness' experience in life, his or her intelligence and capacity for self-expression, and the witness' powers of observation and recollection.

You must examine into the interest of the witnesses. Determine whether any interest which a witness may have has caused that witness to exaggerate, to distort, or to testify untruthfully. An interested witness is one who has something to gain or lose by your verdict.

I further charge you that the plaintiff, Prince Youssoupoff, and his wife, Princess Irina Youssoupoff, and the defendant's witnesses, Mrs. Peggy Kent and Mrs. Ginny Blair, the authors of the play "If I Should Die," are all interested witnesses.

It must be noted here that the plaintiff, Prince Felix Youssoupoff, is not a citizen of the United States of America, nor is he a resident of the State of New York. This fact is not to enter into your deliberations on the question of whether he should receive a verdict in his favor or whether the verdict should be in favor of the defendant. Under our laws, a foreign national or a non-resident of

this state who sues in our courts to recover damages for a claim he has against another is entitled to the same consideration you would give to a citizen of this country or a resident of this state. As I told you in my preliminary instructions which I gave you at the opening of this trial, equal justice under the law is the goal of this Court.

The testimony of an interested witness is to be weighed more carefully and scrutinized more closely than the testimony of a disinterested witness. However, if you believe a witness, whether interested or disinterested, you must give full weight to the testimony of such witness.

If you believe that any witness in this case has deliberately testified falsely as to any material fact, you may, if you choose, disregard the whole or any part of his or her testimony. You may believe part, you may disbelieve part.

You are not concerned with the question of whether the plaintiff killed Rasputin. Prince Youssoupoff admits that. You are to decide whether the defendant's half-hour telecast entitled "If I Should Die" did invade the privacy of the plaintiff, as he contends, by the authors' use of certain fictionalized dialogue and actors' movements in recreating the last hours of Rasputin and thereby ascribed certain untrue actions to the plaintiff.

In your appraisal of the plaintiff as a witness in his own behalf you are to employ the same bases for determining his credibility as you will use in deciding the believability of every other interested witness, and in addition, you may include as criteria of his credibility the plaintiff's admission that he did participate in the killing of Rasputin.

I have previously stated to you that the plaintiff has the burden of proving his case by a fair preponderance of the evidence. The term "fair preponderance of the evi-

dence" means such credible or believable evidence, when weighed with that opposed to it, as has more convincing force, and that the greater probability of truth lies therein. It is the evidence that is more probable, more persuasive, and of greater probative value.

It is the quality of the evidence that must be weighed, not the quantity. You must therefore weigh the credible or believable evidence given to you by both sides.

If, after weighing the evidence, you find that it favors the plaintiff, then he has sustained his burden of proof. If you find that the evidence is equal between the plaintiff and the defendant or if you find that the evidence favors the defendant, then the plaintiff has not sustained the burden of proof, and your verdict must be for the defendant.

The plaintiff, Felix Youssoupoff, brings this action against the defendant, Columbia Broadcasting System, Incorporated, to recover money damages he sustained resulting from a violation of his right of privacy under Section 51 of the Civil Rights Law of the State of New York. It is the plaintiff's claim that his right of privacy was violated by the defendant on January 5, 1963, when the defendant televised over the facilities of its New York City station, WCBS-TV, a play entitled "If I Should Die."

The plaintiff has withdrawn his claim for damages arising out of the Chicago telecast over WBBM-TV on January 2, 1963.

This play allegedly depicted the events surrounding the assassination of Rasputin on December 16, 1916, in plaintiff's palace in Russia. The part of the plaintiff, as well as that of the other male and female characters, were portrayed by different actors. The plaintiff contends that the play did not accurately recreate the true events surrounding

the slaying of Rasputin and that it was in a large part a fictionalization with contrived dialogue composed by the authors of the play to make it more palatable and acceptable to the viewing public. The plaintiff claims that many of the events depicted in the play never took place and the dialogue ascribed to plaintiff, Rasputin and others, never occurred.

It is the further contention of the plaintiff that the untrue dialogue, combined with the expressions and gestures of the actors and actresses in the delivery of their lines, falsely portrayed the plaintiff as offering the body and soul of his wife, Princess Irina, as the bait to lure Rasputin to the palace on the night of the assassination. Plaintiff further contends that his patriotic motive for killing Rasputin was distorted in the opening narration by limiting the Prince's motive for the slaying of Rasputin to because of his debaucheries in a sensual sense only.

The defendant denies that it is in any way liable to the plaintiff. The defendant contends that the play was a substantially accurate retelling of the historical events of the conspiracy to kill and the assassination of Rasputin.

Section 51 of the Civil Rights Law of the State of New York is known as the right of privacy law. In so far as it applies to this action, it provides that any person whose name, portrait or picture is used within the state for the purpose of trade without first obtaining his written consent may sue and recover compensatory damages for any injury sustained by such use, and if the defendant shall have knowingly used such person's name, portrait or picture, in a manner forbidden by this law, then the jury may, in its discretion, also award punitive damages.

There is no dispute in this case that the play "If I Should Die" was televised in this state and that the defendant did

not obtain plaintiff's written consent to such broadcast of the play.

You will recall that during the course of the trial counsel for the defendant conceded that the play was televised during the regular course of defendant's business and/or trade. However, this concession was made without any admission by the defendant that it was thereby liable to the plaintiff.

Under the law, there are certain instances in which a defendant may use a person's name, portrait or picture for purposes of trade without first obtaining such person's written consent and still not be liable to that person. One of such examples is where the use of the person's name, portrait or picture is made in connection with a substantially accurate retelling or showing of an historical event.

That is the issue which you must decide in this case. Were those portions of the play of which the plaintiff complains a fictionalized version of the events surrounding the death of Rasputin, or was it a substantially accurate re-enactment of such events as claimed by the defendant? Did the televised play, as claimed by the plaintiff, falsely depict plaintiff's motive in participating in the acts culminating in Rasputin's death? Did the play, as claimed by the plaintiff, falsely depict the plaintiff as offering his wife's body and soul to Rasputin as the bait to lure Rasputin to plaintiff's palace on the night of the assassination? Or was the televised play, as contended by the defendant, a substantially accurate relation of these events? These are the questions which you must answer and decide in this case.

In your consideration of these questions you must consider all of the testimony in this case and the exhibits, which include the passages from plaintiff's two books, the photographs in the same books, the transcript of the dia-

logue, as well as the film of the telecast "If I Should Die" which you viewed during this trial. You must consider both the direct and the cross-examination testimony of each of the witnesses. In determining the meaning of the words spoken by the actors and actresses in the broadcast you should also consider their gestures and appearances as they spoke their lines and the continuity and sequence of the scenes.

I charge you that the burden of proof is upon the plaintiff to prove by a fair preponderance of the credible or believable evidence that portions of the television program were fictionalized and not based upon fact, and the plaintiff has the burden of proving in what respects the play varied from what in fact occurred. Of course, an innocuous departure from the fact does not render the defendant liable.

I charge you that the mere use of the drama form involving actors, stage settings and dialogue to recreate an historical event does not in and of itself represent a violation of plaintiff's right of privacy.

Before the plaintiff is entitled to a verdict against the defendant you must find that the television program "If I Should Die" altered or changed the true facts concerning the plaintiff's relationship to the events of Rasputin's death so that the play as televised constituted substantial fiction or a fictionalized version of what actually did take place. Unless you find that the play was a substantial fictionalization, then your verdict must be for the defendant. If you find that the play was a substantially accurate retelling of the events, then your verdict must be for the defendant.

I shall now discuss with you the question of damages, that is, how much money you may award to the plaintiff.

There is only one plaintiff. I must underscore that. The Prince alone is suing here, not the princess.

The fact that I now speak of damages is not to be taken by you as any indication of how the Court feels about this case. The Court has no opinion of the facts in the case, and it is for you alone, as the exclusive judges of the facts, to determine whether or not the plaintiff is entitled to any damages. If you do first determine that the plaintiff is entitled to a verdict against the defendant, then and only then are you to give consideration to an award of the types of damages as provided for in Section 51 of the Civil Rights Law.

The first type is what is known as compensatory damages. Compensatory damages may be awarded to the plaintiff to reasonably and adequately compensate him for any embarrassment, humiliation or mental distress he may have sustained as a result of the television broadcast on January 5, 1963, over the facilities of Station WCBS-TV, New York.

I charge you that the plaintiff does not seek any money damages for any injury he may have sustained to his reputation. This is not a libel action, but is a right of privacy action in which the plaintiff is claiming money damages for the embarrassment, humiliation, or mental distress he suffered as a result of the showing of the play.

I caution you that the plaintiff's wife, Princess Irina Youssoupoff, is not a party to this action. Therefore, you must consider only such injuries as may have been suffered by the Prince.

In determining whether the plaintiff suffered any embarrassment, humiliation, or mental pain resulting from the television broadcast of January 5, 1963, you may take into

consideration that the plaintiff never saw the television broadcast prior to the commencement of this trial. However, you must also take into consideration the plaintiff's testimony that he was informed about the television broadcast a short time after it was made.

If, after a careful review and consideration of all the evidence in this case, you find that the plaintiff is entitled to a verdict against the defendant, but you also find that the plaintiff suffered no measureable damages, you will award the plaintiff compensatory damages in the nominal sum of six cents.

If you find a verdict in favor of the plaintiff for compensatory damages in any amount, then and only then you may, in your discretion, also award what are known as punitive damages. Punitive damages are the second type of damages provided for in Section 51 of the Civil Rights Law of the state, and are awarded, not to compensate a plaintiff for any injuries he may have sustained, but are granted to punish a defendant and to deter the defendant and others from committing similar acts in the future.

You may award punitive damages against the defendant only if you find from the evidence that the defendant knowingly and falsely depicted plaintiff's role in the killing of Rasputin and that this was done through a failure to make a reasonable investigation of the facts surrounding the killing of Rasputin and whether the plaintiff was still alive. Actual malice or ill will towards the plaintiff does not have to be proven if you find that the defendant recklessly and wantonly disregarded the plaintiff's rights.

If you find that the defendant acted in good faith, based upon a reasonable research on the subject of Rasputin's death, then you may not award punitive damages to the plaintiff. You may also consider the testimony of defendant's witnesses that although they were not certain

that the plaintiff was dead or alive, they made no efforts to locate him, nor did any of the defendant's witnesses read the plaintiff's own books. You may also consider that the authors and the producer did read other books on the subject, three of which were written by recognized authorities on Rasputin's death.

Members of the jury, the law provides that in this case, as in every civil case, a determination by five-sixths of the jury in favor of one party against the other constitutes a valid jury verdict. If, therefore, after a careful review and consideration of the evidence, ten or more of you agree in favor of one party and against the other, you may bring your deliberations to an end and report your verdict to the Court through your foreman.

Your verdict will be one of the following, and I give you three:

First, a verdict in favor of the defendant Columbia Broadcasting System, Incorporated, against the plaintiff, Felix Youssoupoff; or,

Two, a verdict in favor of the plaintiff against the defendant for compensatory damages only, in such sum as you fix and determine; or,

Three, a verdict in favor of the plaintiff against the defendant for compensatory damages, in such sum as you decide, and a separate verdict in favor of the plaintiff against the defendant for punitive damages, in such amount as you determine.

Take this case now, discuss the evidence with the other jurors, and try by legitimate argument, to reconcile any differences of opinion which may exist. Make a conscientious effort to agree upon a verdict in accordance with the evidence and the law as I have charged you. Be fair, do what you know is right, and then no one may rightfully complain.

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